Supreme Court, U.S.
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No. 80-150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HARTFORD ACCIDENT & INDEMNITY COMPANY
Petitioner

vs.

JOHN MILES, JR.
Respondent

Respondent's Brief Opposing Certiorari

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JURISDICTION

The Court of Civil Appeals decided this case under Texas Law (Texas Business and Commerce Code, §§1.201(32); 2.106; 2.401[b]; 2.501 -- the U.C.C.). This holding under state law (that there was a "purchase") being adequate to support the judgment, this Court has no jurisdiction to review. *Herb v. Pitcairn*, (1954) 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789.

Further, the point raised has been decided by *Smeed v. National Surety Corp.*, (C.C.A., 9th, 1960) 274 F.2d 414, and no important question of federal law is involved, under 28 USC §1257(3).

STATEMENT OF THE CASE

The facts are as stated in the opinion of the Court of Civil Appeals. See Petition for Certiorari, Appendix A, pp. 12-20. It should, however, be emphasized that Starks (dealer) paid $14,300.00 part payment when the sale contract was executed. Delivery was FOB the ranch. The parties worked together to sell the cattle to third parties, carefully crediting the dealer's debt with the proceeds of resale. The seller thus avoided the pitfall presented by *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. 1976) cert. den. 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99, with full knowledge and assistence of the defaulting seller. The Court below held that a sale and purchase was effected under Texas law.

Petitioner took the position in the Court of Civil Appeals that the state law controlled, and, that the Packers and Stockyards Act didn't apply. *Brief of Appellee, Court of Civil Appeals, Counterpoint One:*

> "Since the executory contract in question called for Miles to deliver his cattle to Starks when Starks paid for them, neither of which occurred,

> *the Packers and Stockyards Act is inapplicable,* and Hartford is not liable on Starks' bond which it executed as surety."

Also, at p. 14:

> "Although the Federal Courts have jurisdiction to hear cases arising under the Packers and Stockyards Act, 28 U.S.C.A. §1352, we are not involved with a question of statutory interpretation requiring resort to Federal Law; rather our question is whether a purchase took place. This must be determined according to the law of the state of the transaction. Thus, Texas law applies in the instant case. See, *Sneed* [sic] *v. Carpenter,* 274 F.2d 414, 417 (9th Cir. 1960)"

Petitioner's position on certiorari before this Court is diametrically opposite its position below. Further, at no point below did Petitioner challenge the constitutionality of the Packers and Stockyards Act.

ARGUMENT

The question was correctly decided in *Smeed v. National Surety Corp.*, (9th Cir., 1960) 274 F.2d 414.

The *Smeed* case involved two distinct cattle sales. In the first, cattle were sold to defendant at a stockyard. Before delivery, he told plaintiff he was unable to pay for the cattle. As in the instant case, the parties agreed to the resale of the cattle to third parties. They sold for less than plaintiff had contracted to buy them for. The court held the surety liable on the defaulting dealer's bond for the difference. The court said:

> "If the surety is not liable under the circumstances here recited, the giving of the required

> bond would be an idle gesture, because no liability could be incurred unless appellant's practice of paying consignors prior to receipt of payment from purchasers was changed, and such a change is neither required by law nor desirable."

By the same token, to hold in this case that the surety is not liable on the bond would be to destroy all cattle contracts for future delivery, thus disrupting the stream of commerce and subverting the express purpose of the Act.

The second set of cattle in the *Smeed* case were purchased by defendant's agent at the seller's ranch. The cattle were to be later delivered at a feed yard, weighed, and payment made. The court held that the purchase was complete prior to delivery of the cattle, "under Idaho law which controls here since the transaction took place in that state." (274 F.2d 417).

The court went on to hold that the bond did not apply in that case, as the Packers and Stockyards Act at that time covered purchases at public stockyards only. The Act was amended (probably as a result of this case), so as to include sales made in the country. (7 USCS §201(c and d), Amended, Act Sept. 2, 1958). Accordingly, the Act expressly covered the sale in this case.

Smeed properly held that delivery by transfer of physical possession was not necessary to a completed sale transaction. There is no language in the Act, regulations or bond which requires physical delivery as a condition to liability either of the dealer or of the bonding company. Such a requirement would disrupt the channels of commerce, wherein millions of sales are made daily without the archaic requirement

of actual physical delivery of the goods being a prerequisite to a completed sale transaction.

The Act was intended to protect farmers and ranchers from loss resulting from selling cattle to defaulting or insolvent buyers. *Travelers Indemnity Co. v. Manly Cattle Co.*, 553 F.2d 943, 945 (5th Cir. 1977). The purpose of the Act has also been held to be:

> ". . . to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Vanwyk v. Bergland*, 570 F.2d 701 (8th Cir., 1978).

The Court below properly applied the Act. It is incredible that Petitioner would, as it has here, argue that failure to require a transfer of possession would invite farmers and ranchers to be guilty of fraud and collusion.

To the contrary, for the dealer to contract the rancher's cattle, and attempt to place the risk of a declining cattle market on the rancher bound to deliver the cattle to him in the future, and then have the bonding company attempt to renege on its bond on the technicalities here urged, delaying payment to the rancher by four years, is patently unfair. It is, as stated by §228b(c)[1] an "unfair practice."

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[1] **(c) Delay in payment or attempt to delay deemed unfair practice.** Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act [7 USCS §§ 181 et seq.]. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act [7 USCS §§ 181 et seq.].

(Aug. 15, 1921, c. 64, Title IV, § 409, as added Sept. 13, 1976, P. L. 94-410, § 7, 90 Stat. 1250.)

PRAYER

Respondent John Miles, Jr. prays that certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing response to Petition for Writ of Certiorari has been made by depositing the same at the United States Post Office with postage prepaid first class on Petitioner, Hartford Accident and Indemnity Company, by mailing three (3) copies to its attorney of record, Rufus S. Garrett, Jr., 2900 Fort Worth National Bank Building, Fort Worth TX 76102.

It is further certified that all parties required to be served have been served as aforesaid this 5th day of August, 1980.

WINFRED HOOPER, JR.